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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-496

MORRIE BENSON, *Petitioner*

against

ARTHUR NEWMAN, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE DREYFUS CORPORATION ET AL. IN OPPOSITION TO THE PETITION

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October 25, 1972

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement of the Case	2
ARGUMENT:	
POINT I—The courts below did not abuse their discretion in approving settlement of the consolidated stockholder derivative action	4
POINT II—The petition herein does not present significant questions that were required to be resolved by the courts below in approving the settlement	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Glicken v. *Bradford*, 35 F.R.D. 144 (S.D.N.Y. 1964)	5
Protective Committee v. *Anderson*, 390 U.S. 414 (1968)	4
Rice v. *Sioux City Cemetery*, 349 U.S. 70 (1955)	5
Rosenfeld v. *Black*, 445 F.2d 1337 (2d Cir. 1971)	3, 5, 6, 7

PAGE

State of West Virginia v. *Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *aff'd per curiam*, 92 S.Ct. 731 (1972) 4

Walters v. *City of St. Louis*, 347 U.S. 231 (1954) ... 7

United States v. *Worley*, 281 U.S. 339 (1930) 7

Statute:

Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* 2

MISCELLANEOUS

Supreme Court Rule 19 5

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Opinions Below

The opinions of the United States District Court for the Southern District of New York (McLean, J.) approving the settlement and the United States Court of Appeals for the Second Circuit (Friendly, J.), affirming the approval of the settlement are set forth at Appendices B and C of the Petition herein and shall not be repeated here.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Is the judgment of the District Court (McLean, J.), approving the settlement of a consolidated stockholder derivative action, subsequently affirmed by the Second Circuit Court of Appeals (Friendly, J.), an abuse of discretion which requires review by the Supreme Court of the United States?

Statutes Involved

The controlling statutes are adequately set forth in the Petition.

Statement of the Case

The Petition herein is based upon the order entered by the United States District Court for the Southern District of New York (McLean, J.) approving a settlement of a consolidated stockholder derivative action commenced in 1968 on behalf of The Dreyfus Fund ("Fund") and representatively on behalf of all its shareholders for alleged violations of the Investment Company Act of 1940 ("the Act").

The consolidated complaint alleged, *inter alia,* that a public sale of 2,446,550 shares of the outstanding stock of The Dreyfus Corporation ("Corporation"), which was the investment adviser to the Fund under a management contract, was a sale of a fiduciary office. The complaint further alleged that proxy materials mailed on October 5, 1965, to solicit Fund shareholder votes for the proposed sale of the aforesaid stock in the Corporation and reinstatement of the management contract held by the Corporation with the Fund, contained false and misleading statements.

After extensive discovery, a trial was commenced before the Honorable Edward McLean on June 7, 1971. The trial

concluded on June 14, 1971. While both parties were preparing post-trial briefs requested by the court, the Second Circuit Court of Appeals rendered its decision in *Rosenfeld* v. *Black,* 445 F.2d 1337 (2d Cir. 1971). Thereafter, negotiations towards a compromise commenced, resulting in a stipulation of settlement which was signed on July 9, 1971. The stipulation provided for a payment of $5,000,000 to the Fund by the Corporation's selling shareholders.

On July 16, 1971, an order was entered by Judge McLean scheduling a hearing on the proposed settlement for September 28, 1971. Notice of the proposed settlement and the hearing date was given to shareholders of the Fund by publication in *The New York Times* on July 17, 30 and August 13, 1971, and in *The Wall Street Journal* on July 23, August 6 and 20, 1971. The Securities and Exchange Commission was also given mailed notice of the proposed settlement and hearing on July 16, 1971. At the hearing, petitioner herein and one other shareholder, who together owned 4,500 of the 48,176,195 shares of the Fund outstanding in 1965, appeared and objected to the proposed settlement.

On December 29, 1971 Judge McLean announced his decision approving the settlement, which appears at Appendix B of the Petition, and an order to that effect was entered on January 12, 1972. On June 9, 1972 an appeal by petitioner and one other shareholder was heard in the Second Circuit Court of Appeals. On June 29, 1972 the order of the District Court approving the settlement was unanimously affirmed (Friendly, J.), and the opinion appears at Appendix C in the petition herein. On July 12, 1972, petitioner made applications to the Court of Appeals for attorney's fees and costs, and they were denied on September 1, 1972.

Having unsuccessfully argued to two courts that the proposed settlement of $5,000,000 was unfair, petitioner

now asks this Court to review those findings. Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

ARGUMENT

POINT I

The courts below did not abuse their discretion in approving settlement of the consolidated stockholder derivative action.

The threshold issue posed by this Petition is whether the approval of this settlement by the District Court (McLean, J.) and the unanimous affirmance of that decision by the Court of Appeals (Friendly, J.) constitute an abuse of discretion that merits review by this Court. *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F.Supp. 710 (S.D.N.Y. 1971), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *aff'd per curiam* 92 S.Ct. 731 (1972). The Petition fails even to discuss the issue or cite any language in the two opinions below that denote an abuse of discretion. On this basis alone, the Petition should be denied.

In approving the settlement of lawsuits, a trial court is invested with broad discretion but must observe certain standards. Although it is not required to scrutinize the merits of compromises in suits between individual litigants, a court is asked to form an " . . . educated estimate of the complexity, expense, and likely duration of such litigation . . ." and ". . . compare the terms of the compromise with the likely rewards of litigation . . ." *Protective Committee* v. *Anderson*, 390 U.S. 414, 424-25 (1968).

One limit upon the discretionary powers of a trial court is that its business judgment should not be substituted for that of the parties who worked out the settlement. Its sole responsibility is to decide whether the settlement is so unfair on its face that it precludes judicial approval.

Glicken v. *Bradford*, 35 F.R.D. 144, 151 (S.D.N.Y. 1964). On appeal, an appellate court is asked to decide only whether a settlement approved by the trial court constitutes a gross abuse of discretion which should not be allowed to stand. *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971), *aff'd per curiam*, 92 S.Ct. 731 (1972).

A Petition for a Writ of Certiorari should only be granted for special and important reasons in matters which present significant problems. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 73-4 (1955). *See also* Supreme Court Rule 19. The Petition herein does not provide any basis on which to reach the conclusion that the approval of this settlement by the District Court and affirmance of that decision require review.

Respondents herein are not aware of any case involving the settlement of a stockholder derivative action in which a Petition for a Writ of Certiorari was ever granted. It is respectfully submitted that the Petition herein fails to demonstrate any reason why the matter at bar requires the review of this Court, and it should be denied.

POINT II

The petition herein does not present significant questions that were required to be resolved by the courts below in approving the settlement.

In his decision approving settlement of this matter, Judge McLean noted the uniqueness of reviewing a settlement after a full trial on the merits. Against this background, the District Court held that plaintiffs had failed to prove that the proxy statement was false and misleading and considered the proposed settlement in relation to the remaining claim of the sale of a fiduciary office in light of *Rosenfeld* v. *Black*, 445 F.2d 1337 (2d Cir. 1971).

It is clear that a judicial review of *Rosenfeld, supra*, is not involved herein. Petitioner argued below that *Rosenfeld* precluded approval of the proposed settlement. Respondents, urging approval, called attention to signifi-

cant distinctions between the Lazard Fund, the mutual fund involved in *Rosenfeld, supra,* and the Dreyfus Fund involved in the instant matter. Except for the fact that the Lazard Fund and the Dreyfus Fund are both in the general category of mutual funds, there is very little similarity between them.

1. The Lazard Fund, one of a specialized few funds, was an instant success. It was practically a riskless venture. The Dreyfus Fund, by contrast, took thirteen years of intense effort, expense and high risk to reach approximately the same size. Thus, one fund had virtually no risk—the other was a high risk operation.

2. The sale of the Lazard Fund was caused by lack of success and disenchantment with the management of their fund. By contrast, the Dreyfus Fund was the most successful fund, both in sales and management record, of any in the field.

3. The Lazard Fund sold the management to an entirely different management organization and told the stockholders that, if they did not approve the sale, "the Board of Directors of the corporation had given no consideration to the course to be followed." By contrast, the Dreyfus Fund offered the same management, with the exception of one person, Jack Dreyfus, Jr., who would still function for five years as a consultant instead of President. The shareholders were given the option of keeping the identical management by voting against the proposal.

4. In *Rosenfeld* v. *Black, supra,* the Court found that the Lazard proxy material might be misleading, while Judge McLean, on the other hand, concluded that the proxy statement was not false and misleading in any material respects.

The foregoing distinctions were given serious consideration by the District Court and the Court of Appeals in

the approving of the settlement. Indeed, in assessing the proposed settlement of $5,000,000, which it described as no "paltry sum", the Court of Appeals considered the exemplary reputation of the Dreyfus Fund and the fact that, regardless of the outcome of the proxy vote by the Fund shareholders, the investment adviser to the Fund would not change. In addition, the Court of Appeals discussed the facts that the Corporation was both investment adviser and principal underwriter to the Fund and possessed a value greater than the sum of its net assets. A final consideration discussed by the appellate court was the possibility that *Rosenfeld, supra*, might be reversed on appeal or diluted by legislation.

The Petitioner's claim that certain factors were not considered below is not persuasive. Judge McLean, who presided at the trial of the entire case without a jury and approved the settlement, certainly had in mind all of the questions raised by Petitioner. Moreover, as the judge considering a proposed settlement after having tried the matter, Judge McLean was in an excellent position to assess its fairness. It is difficult to envision circumstances under which a court can make a more "educated estimate" of the fairness of a proposed settlement. As stated, the affirmance by the Court of Appeals came only after a thorough analysis. The Petition herein does not dispute these facts but seeks now to present certain alleged questions he claims were not answered by the courts below. Even if that were true, this Court has held that, where the resolution of questions is not necessary for a decision in the matter at bar, it need not be answered. *United States* v. *Worley*, 281 U.S. 339, 340 (1930). *See also Walters* v. *City of St. Louis*, 347 U.S. 231 (1954). This reason alone warrants a denial of the Petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition herein for a writ of certiorari to the Unted States Court of Appeals for the Second Circuit should be denied.

Dated: October 25, 1972.

Respectfully submitted,

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